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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

**No. 666**

CATHERINE HEIDMAN,
*Petitioner,*

*vs.*

THE PEOPLE OF THE STATE OF ILLINOIS,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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*To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court.*

Now comes Catherine Heidman, plaintiff, defendant in error below, by her duly authorized attorneys, Julius L. Sherwin and Theodore R. Sherwin, and pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered on May 23, 1957 (R. 14), rehearing denied, September 16, 1957 (R. 17).

In support of this petition, your petitioner respectfully shows:

### OPINION BELOW.

The Criminal Court of Cook County did not prepare or publish an opinion. The opinion of the Supreme Court of Illinois is reported in 11 Illinois 2nd, 501; 144 N. E. (2d) 580.

## JURISDICTION.

The Judgment of the Supreme Court of Illinois was entered on May 23, 1957 (R. 14). A petition for rehearing was denied on September 16, 1957 (R. 17). On September 19, 1957 the Supreme Court of Illinois entered its order staying the mandate herein ninety days to enable the petitioner to file her petition for certiorari (R. 20).

## STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION.

This Court's jurisdiction is invoked pursuant to Title 28, Section 1257, Subsection (3), U. S. C. A.

## THE QUESTION PRESENTED FOR REVIEW.

The question presented for review is whether the petitioner was denied due process of law and equal protection of the laws, contrary to her rights under Section 1 of the Fourteenth Amendment of the Constitution of the United States, when police officers, having a warrant solely for the arrest of her person, arrest the petitioner outside of her apartment on a common stairway leading thereto and thereafter enter her apartment, and in a general exploratory search go past several rooms to a front room at right angles thereto and there, without a search warrant seize numerous articles the property of said petitioner which were later received in evidence upon her trial over her motion to suppress said articles and objection to their admission into evidence; particularly when said police-officers had no knowledge of the relationship of said articles to the alleged crime and where an assistant state's attorney having specific information relating thereto had ample and sufficient time to procure a search warrant for the search of the premises at the same time that he procured the warrant for the arrest of the petitioner, but failed to do so.

## CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision involved is found in Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE.

Petitioner was indicted jointly with one John E. Smuk by the Cook County, Illinois, Grand Jury for the crime of abortion. The indictment consisted of two counts which recited in substance that petitioner and one John E. Smuk on January 28, 1954, unlawfully, feloniously and wilfully employed certain instruments and by the use thereof upon one Mary Karageorge caused the abortion and miscarriage of said Mary Karageorge contrary to Statute and contrary to law (R. 3; Abst. 1-2).

The State elected to proceed solely against the defendant Catherine Heidman petitioner herein. On May 25, 1955, petitioner was by a jury found guilty as charged (R. 3; Abst. 9). After post-trial motions were overruled petitioner was sentenced to the Illinois State Reformatory for Women for an undeterminate term of one to three years (R. 3; Abst. 13-14).

Prior to trial petitioner interposed a motion to suppress evidence alleging in her verified petition in support thereof the violation of her constitutional rights under the Con-

stitution of the State of Illinois, and in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States (R. 3; Abst. 4-7).

On the hearing upon said motion and petition to suppress said evidence, it was shown by the testimony of an assistant state's attorney that he had obtained specific information from the prosecutrix concerning certain instruments and articles that were used in the commission of the alleged crime. Upon that information he then applied for and obtained a warrant for the arrest of the petitioner. Though he could at the same time have obtained a search warrant for the search of the petitioner's apartment he did not do so (R. 3; Abst. 27-28). He made arrangements with four police officers and a policewoman for the arrest of the petitioner (R. 3; Abst. 28-29). He then accompanied those police officers to an apartment building located at 433 W. 119th Street, in Chicago, Illinois, wherein the petitioner occupied a second floor apartment as her home. Upon said warrant, solely for the arrest of her person, said police officers arrested the petitioner on the stairs in a common hallway leading up to her apartment. Following this arrest the police officers were advised by the assistant state's attorney that they had the right to conduct a search of petitioner's apartment (R. 3; Abst. 29). They thereupon entered her apartment and without a search warrant or consent of the petitioner they conducted a general exploratory search of her entire apartment. They first entered a reception room, then went past two other rooms in said apartment and made a turn at right angles thereto and entered a front room of said apartment and there seized certain records, medical supplies, instruments, operating table and other miscellaneous items, some of which were later offered and received as evidence upon the trial over the defendant's objection. The items received as evidence were a white table (People's Exhibit 2), a rubber pad (People's

Exhibit 3), a white bucket (People's Exhibit 4), a sterilizer (People's Exhibit 5) and a radio (People's Exhibit 6) (R. 3; Abst. 198), and People's Exhibits 7 to 10, inclusive, being assorted surgical instruments (R. 3; Abst. 199), as well as People's Exhibits 24 to 29, inclusive, being other assorted medical surgical instruments (R. 3; Abst. 204).

The trial court on the hearing of the motion to suppress evidence sustained said motion in part and overruled said motion as to all of the foregoing exhibits, saying:

> "I am suppressing all the things that were concealed that were not out in the open when this raid was made * * * Now all the other things * * *, the operating table, the medical equipment, which was there sitting on tables and desks, and so forth, in plain sight, the court refuses to suppress." (R. 3; Abst. 91.)

There were no articles in plain sight of the police officers when they arrested the petitioner on the stairs outside of her apartment (R. 3; Abst. 29-30), nor were said articles in plain sight or within sight at all while said police officers were in the petitioner's reception room. It was only after said police officers commenced upon a general exploratory search and proceeded past two other rooms and made a right-angle turn into the front room of the petitioner's apartment that the seized articles were in sight or view of said police officers (R. 3; Abst. 31-32).

## REASONS FOR GRANTING WRIT.

**When Police Officers, Having a Warrant Solely for the Arrest of Her Person, Arrest the Petitioner Outside of Her Apartment on a Common Stairway Leading Thereto, the Subsequent Search, Without a Search Warrant of the Front Room of Said Apartment and the Seizure of Certain Surgical Instruments and Other Articles Therein, About Which Said Police Officers Had No Knowledge Concerning the Relationship Thereof to an Alleged Offense, Is Illegal and in Contravention of the Rights Guaranteed Said Petitioner Under Section 1 of the Fourteenth Amendment to the Constitution of the United States.**

Prior to trial the petitioner filed her verified petition in support of her motion to suppress certain evidence seized by police officers without permission and without a search warrant from the front room of her second floor apartment at 433 West 119th, Chicago, Illinois, in violation of the rights guaranteed her under Section 1 of the 14th Amendment to the Constitution of the United States (R. 3; Abst. 4-7).

A hearing was had out of the presence of the jury upon said motion. It was shown by the State's witnesses that an Assistant State's Attorney had conversed with the prosecuting witness on January 30, 1954. She gave him certain information concerning the commission of an alleged abortion upon her two days prior thereto, in which she alleged that the petitioner assisted. Two days after the conversation with said Assistant State's Attorney on February 1, 1957, she went with one Patrick Egan, another As-

sistant State's Attorney, before a Judge of the Municipal Court of Chicago, and there subscribed to a complaint upon which a warrant was issued, solely for the arrest of the petitioner. No application was at that time made for a search warrant, despite the fact that the prosecutrix had given to each of the Assistant State's Attorneys a complete description of certain surgical instruments and other articles connected with alleged offense, as being in the front room of the petitioner's apartment where the alleged operation occurred (R. 3; Abst. 27-28).

Assistant State's Attorney Egan, accompanied by four police officers and a policewoman, then went to the apartment building where the petitioner lived. One of the raiding party rang her doorbell, and as she descended the common stairs from the second floor toward the first floor vestibule of said building she was met midway on the stairway by one of the police officers who displayed the warrant for the arrest of her person and there immediately placed the petitioner under arrest.

Assistant State's Attorney Egan then advised the police officers that they had the right to search petitioner's apartment (R. 3; Abst. 29). Acting on said advice the police officer, the Assistant State's Attorney, the policewoman and another police officer entered the reception room immediately inside the door of the petitioner's apartment. While she was thus detained, under arrest, one of the raiding party opened a rear door leading to the kitchen of her apartment and admitted the other police officers (R. 3; Abst. 75-76).

While within the reception room of the petitioner's apartment with the petitioner thus under arrest and restraint of said officers, none of the surgical instruments or articles subsequently seized, were within their proximity or view, nor within the confines of said reception room.

Without a search warrant and without the consent of the petitioner the raiding party began a general exploratory search of petitioner's apartment. From the reception room certain of the police officers went past a bathroom, two separate bedrooms and then at right angles to the last of these rooms, entered a front room or living-room, from which they then seized the articles sought to be suppressed (R. 3; Abst. 32).

In *McDonald* v. *United States,* 335 U. S. 451, this Court at pp. 454-455, there said:

> "* * * A search without a warrant demands exceptional circumstances, as we held in *Johnson* v. *United States,* 333 U. S. 10. * * * We cannot allow the constitutional barrier that protects the privacy of the individual to be hurdled so easily.
>
> * * * * *
>
> Here as in *Johnson* v. *United States* and *Trupiano* v. *United States* (334 U. S. 699), the defendant was not fleeing or seeking to escape. Officers were there to apprehend petitioners in case they tried to leave. Nor was the property in the process of destruction nor as likely to be destroyed as the opium paraphernalia in the *Johnson* case. * * * No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for by-passing the constitutional requirement, as we held in *Johnson* v. *United States, supra,* p. 15."

On the subject matter of seizure of property without search warrants this Court in *Trupiano* v. *United States,* 334 U. S. 699, 705, said:

> "It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. *Carroll* v. *United States* (267 U. S. 156); *Go-Bart Co.* v. *United States* (282 U. S. 344, 358); *Taylor* v. *United*

*States,* 286 U. S. 1, 6; *Johnson* v. *United States,* 333 U. S. 10, 14-15. This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. *United States* v. *Lefkovitz* (285 U. S. 452 464). In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.

* * * * *

The mere fact that there is a valid arrest does not *ipso facto* legalize a search or seizure without a warrant. *Carroll* v. *United States, supra* 158."

In *Agnello* v. *United States,* 269 U. S. 20, at page 33, this Court said:

"Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts federal or state, for the search of a private dwelling house without a warrant. Absence of any judicial approval is persuasive authority that it is unlawful."

In the *Agnello* case this court at page 35, further stated:

"As said in *Silverthorne Lumber Co.* v. *United States* (251 U. S. 385, 392), 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all' ".

In *Work* v. *United States,* 243 F. 2d 660 (C. A. D. of C. 1957), in commenting upon a search and seizure without a search warrant, the court at page 661, said:

"However well intentioned, the entry into the home without a warrant of any kind was not under 'exceptional circumstances' dispensing with the necessity for a warrant. Accordingly it was the beginning of an unreasonable search:

"* * * Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause. * * *" *Agnello* v. *United States*, 269 U. S. 20, 33, 46 S. Ct. 4, 6; 70 L. Ed 145."

In *Walker* v. *United States*, 225 F. 2d 447 (C. A. 5, 1955), the court held the search and seizure unreasonable, and quoted from this Court's pronouncement in *Agnello* v. *United States*, 269 U. S. 20, 32, and at page 450 said:

"'The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws.'"

In *Lee* v. *United States*, 232 F. 2d 354, 356 (C. A. D. of C. 1956) the court said:

"Since there was no arrest to which the search and seizure were incident, and since there was no search warrant, the search and seizure of the guns were unlawful under the Fourth Amendment to the Constitution of the United States, for there was no circumstances which could justify dispensing with the necessity for a search warrant. Assuming, without deciding, that the informer's tip would have given the police probable cause to support an arrest without a warrant, this did not constitute 'exceptional circumstances' which supported the search or seizure without a search warrant."

In view of the foregoing authorities and the many supporting authorities therein cited by this Court and the various Courts of Appeal, there was no justification on the part of the officers in the instant case to either enter the apartment of the petitioner and to thereupon embark upon an exploratory search thereof.

The petitioner had been arrested upon a semi-public stairway of the apartment building in which she resided. She was in absolute and complete custody of the arresting officer who was then and there in the immediate company of other police officers, a policewoman and an assistant state's attorney. There was no danger of her escape and there were no "exceptional circumstances" that justified a general exploratory search of her apartment. There was no basis in law for the assistant state's attorney to advise the officers that they had the right to search the petitioner's apartment. On the contrary it appears that upon the very information that induced the same assistant state's attorney to procure a warrant for the arrest of the petitioner (which information came to him two days before the warrant for the arrest of the petitioner had issued) he could, at the same time, have procured a search warrant to search the apartment of the petitioner, but chose not to do so.

It is respectfully submitted that to hold justifiable and proper, the search and seizure disclosed in this case would be to abolish entirely the need for search warrants generally, and to nullify the constitutional provisions applicable thereto.

## CONCLUSION.

WHEREFORE, petitioner prays for the allowance of a writ of certiorari to the Supreme Court of Illinois in the case entitled "The People of the State of Illinois, Plaintiff, Defendant in Error, *vs.* Catherine Heidman, Defendant, Plaintiff in Error, No. 34196," in order that this case may be reviewed and determined by this Honorable Court.

Respectfully submitted,

JULIUS L. SHERWIN,
THEODORE R. SHERWIN,
77 W. Washington Street,
Chicago 2, Illinois,
*Attorneys for Petitioner.*

Dated: December 12, 1957.

## APPEARANCE.

We, Julius L. Sherwin and Theodore R. Sherwin, members of the bar of the Supreme Court of the United States, do hereby enter our appearance for Catherine Heidman, Petitioner.

Julius L. Sherwin

JULIUS L. SHERWIN,

Theodore R. Sherwin

THEODORE R. SHERWIN,
77 W. Washington Street,
Chicago 2, Illinois.

**PROOF OF SERVICE.**

I, Julius L. Sherwin, an attorney of record for Catherine Heidman, petitioner herein, depose and say that on the 12th day of December, 1957, I served a copy of the foregoing petition, by mailing the same, with first class postage prepaid, to the following counsel of record:

Latham Castle,
Supreme Court Building,
Springfield, Illinois,
Attorney General of Illinois.

Benjamin S. Adamowski,
Cook County Criminal Courthouse
Chicago 8, Illinois,
State's Attorney of Cook County, Illinois.

Julius L. Sherwin

JULIUS L. SHERWIN.

Subscribed and sworn to before me, at Chicago, Illinois, this 12th day of December, 1957.

James E. Caurel

*Notary Public.*

My Commission Expires December 14, 1960.

# APPENDIX.

## OPINION OF SUPREME COURT OF ILLINOIS.

Mr. Chief Justice Klingbiel delivered the opinion of the court:

The defendant, Catherine Heidman, was indicted jointly with one John E. Smuk in the criminal court of Cook County for the crime of abortion. The State elected to proceed solely against the defendant, Catherine Heidman, who was tried by jury, found guilty, and sentenced to imprisonment for a term of not less than one year nor more than three. She prosecutes this writ of error, contending that she was tried as an accessory and the evidence is insufficient to prove her guilt as such, that incompetent evidence was admitted, that the argument of the prosecutor was inflammatory and prejudicial, and that error was committed in giving and refusing certain instructions.

The only witness who testified for the People concerning the alleged operation and defendant's connection therewith was the prosecuting witness, Mary Karageorge. She testified that she had sexual intercourse with a man in the month of November, 1953, and in December and January she had no menstrual period. On January 27 she and another person went to see Dr. Smuk at his office at 1726 West Chicago Avenue, Chicago. He examined her, and in response to her inquiry told her she was pregnant. She told him she had five children and could not afford another one. He thereupon wrote the name "Heidman" and "435 W. 119th St." on a slip of paper and told her to go to that address the next morning. She paid Dr. Smuk no

money and made no appointment to see him either for the first or any subsequent meeting. Complaining witness presented herself at the 119th Street address the following morning and discussed the abortion with defendant, who fixed the fee and collected the money.

Complaining witness testified that thereafter defendant told her to go to the bathroom brought her a white surgical gown, took her to a room equipped with operating table, sterilizer, instruments, etc., gave her an injection in the arm, put her on the operating table, adjusted her feet in the stirrups of the operating table and placed a towel over her face. She further testified that while lying on the operating table with her feet in the stirrups she pushed the towel off her face. She observed Dr. Smuk who had on a white surgical gown, a cap, and a mask over his face which covered his mouth and chin. There was no mention of his name by either the doctor or defendant, nor did the complaining witness call him by name. She recognized him by his build and voice. Further testifying, complaining witness stated that defendant handed two instruments to the doctor who inserted both in her vagina. She felt pain, and could hear the scraping of the instruments on each other inside her. Defendant from time to time handed the doctor other instruments which were inserted in her vagina. She told the complaining witness that "you girls are pigs" and that she had to clean out their dirty mess. During the operation defendant administered another injection in the complaining witness's leg to alleviate the pain.

There is no testimony by the complaining witness or elsewhere in the record that the defendant personally used or employed instruments on her and thereby caused or produced the abortion and miscarriage complained of. In all of the testimony pertaining to the operation, the complaining witness related in detail the performance of "Dr. Smuk" and his use of the instruments. The defendant in-

sists that the trial court erred in refusing to direct a verdict of not guilty as requested at the close of the State's case and at the close of all the evidence because of the failure of the State to prove beyond a reasonable doubt the allegation that John E. Smuk named in the indictment was the Dr. Smuk testified about. She contends the prosecutor's theory at the trial, as disclosed by an instruction and certain statements in his argument to the jury, was that defendant was an accessory before the fact in aiding and assisting John E. Smuk, the principal; that since there can be no accessory without a guilty principal, it was encumbent upon the State to prove a commission of the crime by the John E. Smuk named in the indictment; and that failure to identify the "Dr. Smuk" referred to in the evidence with the John E. Smuk named in the indictment was therefore a failure to prove her guilt as accessory. There is no merit in the contention. The indictment charged both persons as principals, and the evidence sufficiently showed participation by the defendant in the acts and conduct described. The indictment would obviously have charged her with the crime even if the co-defendant's name had been omitted. It is evident, therefore, that the name was not material. Where an allegation is not essential to the crime charged, and could be stricken from the indictment without leaving it insufficient, a failure to prove the allegation does not prejudice the defendant. (*People* v. *Taranto,* 2 Ill. 2d 476.) Nor is a variance with respect to the names alleged in an indictment and proved by the evidence regarded as material unless it is of such a substantial character as to mislead the defendant in preparing his defense or unless it may place him in jeopardy a second time for the same offense. (*People* v. *Braverman,* 340 Ill. 525.) In the present case defendant cannot be subjected to double jeopardy, nor could she have been prejudiced in making her defense, since there is no question

about the identity of the woman upon whom the alleged abortion was performed, or about the time, place and manner of committing the crime.

Defendant next contends error was committed in admitting evidence to show she had previously committed an abortion on one Esther Carlin. It is argued that the evidence fails to identify defendant as the perpetrator of the offense. Defendant also argues that to be competent as proof of guilty knowledge, such evidence must show the acts constituted a criminal offense; and that the present evidence failed to show the essential fact of pregnancy. Esther Carlin testified on behalf of the State that in December, 1953, after having previously had intercourse, she did not have her regular normal menstrual period; that she went to a doctor's office, where a urine test was taken; and after talking to a girl friend later, she went to 435 W. 119th Street and rang the Heidman door bell. She was admitted to the apartment by a woman whose name she later learned was Heidman, and declared she was there for an abortion. She was taken into a room where the woman gave her an injection in the arm and asked her if she wanted to go through with the abortion. On receiving an affirmative reply from the witness, the woman took the sum of $200 from her, helped her onto a table and placed her feet into stirrups. A towel was placed over her face. The witness then heard a man's voice, and a treatment was performed upon her similar to that described by the prosecuting witness. When it was finished the woman who had admitted her asked her to get dressed and advised her to take aspirin if she felt any pain. Upon being asked in the courtroom whether defendant was the woman referred to, the witness testified that "She looks like the woman." On cross-examination the witness said "I can't say positive, but she looks like she would be."

It is not disputed that evidence of prior similar offenses

is competent to prove the criminal intent of one accused of performing an abortion. (*People* v. *Gleitsmann,* 384 Ill. 303.) Defendant insists, however, that the evidence in this case is insufficient to prove the material elements of the prior offense. To be competent as proof of guilty knowledge the evidence must show that the alleged similar offense was in fact a criminal one. (*People* v. *Rongetti,* 338 Ill. 56.) While the testimony as to Esther Carlin's pregnancy may have been inadequate to prove defendant caused her to abort, the evidence was sufficient to show an attempt to commit an abortion on her. (See *People* v. *Peyser,* 380 Ill. 404, 407.) The jury was carefully instructed not to consider it as evidence of defendant's guilt on the present charge of abortion, but only for the purpose of proving the intent which she might have had in dealing with Mary Karageorge. There was no error in admitting it for such purpose.

Defendant's objection to the sufficiency of the identification must also be rejected. Although Esther Carlin's testimony identifying defendant was not positive, it was not denied by defendant. Its weight was a question for the jury in connection with the other circumstances to which she testified. *People* v. *Maciejewski,* 294 Ill. 390.

Defendant also contends the court erred in overruling in part her motion to suppress evidence obtained by a search of her apartment. At the hearing on the motion it appeared that she occupied the second floor apartment in the building located at 433 West 119th Street. On February 1, 1954, she was arrested on the stairs leading from the first floor vestibule to the second floor, the arrest being made by a police officer who had a warrant for the arrest. She then entered her apartment, followed by three officers and an assistant State's Attorney. A few minutes later another police officer came into the apartment through the front door, and two additional officers entered through the rear

door. They removed from her person five ten-dollar bills, and then proceeded to search the apartment. From the drawer of a cabinet they removed certain papers, and in the reception room they found the sum of $300. The police officers and the assistant State's Attorney waited in the apartment for some two hours until a patrol wagon arrived, whereupon an operating table, together with certain instruments, medical supplies and records were removed from the front room of the apartment and transported to the patrol wagon. The following day the defendant, who remained in custody of the police, was brought back to her apartment. After she unlocked the door, police officers entered and made certain photographs depicting the interior of the apartment.

The court granted defendant's motion as to certain checks, receipts, a diary, and other records, all of which "were not in sight and which required the officers to rummage and seek them by opening drawers and desks, and so forth." The motion was denied, however, as to the money removed from the person of defendant, as well as to objects connected with the crime "which were in plain sight in the reception room and in the office." The court accordingly refused to suppress as evidence the operating table, medical equipment and other articles which were observed on tables and desks.

The mere fact that an accused is lawfully arrested upon warrant cannot ordinarily justify the officers in searching his home or place of business without first obtaining a search warrant therefor. (*People* v. *Kalpak*, 10 Ill. 2d 441; *People* v. *Schmoll*, 383 Ill. 280; *People* v. *Martin*, 382 Ill. 192.) The officer has the right, as an incident of the arrest, to search the prisoner; and evidence taken from the person as a result of that search is admissible against him. (*People* v. *Kalpak*, 10 Ill. 2d 411.) This right of incidental search may in proper cases extend beyond the person to an area in

immediate physical relation to him; (*People* v. *Tillman*, 1 Ill. 2d 525;) but its extent is limited by the reasons for its existence: namely, to protect the arresting officer and deprive the prisoner of potential means of escape, and to prevent destruction of evidence by the arrested person. (See *United States* v. *Rabinowitz*, 339 U. S. 56, 72, 94 L. ed. 653, 663-664. Dissenting op.) In determining the reasonableness of a search or seizure the particular facts and circumstances must be considered. In the present case we think the officers did not act unreasonably in seizing the articles in question. An examination of the record discloses that when the arresting officer started to read the warrant to defendant at her apartment door, which was standing open, she then said "come on inside; the neighbors upstairs will hear you." It thus appears that entry to the apartment was lawful, and it is not disputed that the articles later admitted into evidence were in plain view and were such as would be used in the commission of the crime. As to such articles there was no unlawful search, since the officers were in the apartment at the invitation of defendant. The right of officers to seize visible instruments of crime at the scene of the arrest is not open to question. (See *United States* v. *Rabinowitz*, 339 U. S. 56, 78, 94 L. ed. 653, 667. Dissenting op.) We conclude that the criminal court was correct in refusing to suppress the articles found in plain sight, or the money obtained in a search of defendant's person, performed as an incident of the lawful arrest.

Complaint is made that the court refused an instruction tendered by defendant which required a verdict of not guilty unless the jury found, *inter alia*, that "John E. Smuk" had committed a criminal abortion upon complaining witness. It is evident from what we have said that the court did not err in this respect.

Also objected to is the giving of an instruction on behalf of the State as follows: "The Court instructs the

jury that if you find from the evidence in this case beyond a reasonable doubt that Mary Karageorge was pregnant with child and that she aborted or miscarried from an operation on the private parts of her body and that said operation was performed, with intent to cause an abortion, and if you further find that the defendant, Catherine Heidman, stood by, aided, abetted or assisted in the performance of this abortion, and that the said operation was not necessary to preserve the life of Mary Karageorge, then the Court instructs you that, as a matter of law, the defendant is guilty of abortion in manner and form as charged in this indictment." The instruction is criticized on the grounds that it "is not limited to the performance of an operation by John E. Smuk"; that it takes away from the jury the question whether an abortion was in fact performed; and that it omits, after the words "stood by," the conjunctive word "and" as used in the statute (Ill. Rev. Stat. 1953, chap. 38, par. 582,) thus erroneously stating that one who stands by may be guilty as an accessory. Other instructions required proof beyond a reasonable doubt that defendant performed the acts charged, and correctly defined an accessory in the language of the statute. Under the facts as conclusively shown, the defendant was present when the alleged offense was committed and took an active part in furtherance thereof. In the light of such evidence and the remaining instructions there could be no possible inference unfavorable to defendant from the language of the instruction in question. The contentions of defendant fail to show that the giving of such instruction was prejudicial error. *People* v. *Levy*, 351 Ill. 110, 119-120; *People* v. *Zwienczak*, 338 Ill. 237, 242; *Cook* v. *People*, 177 Ill. 146, 155-156.

Defendant urges that she was prejudiced by improper and inflammatory remarks of the prosecutor. In his argument to the jury he said: "How many people do you

know who would love to have a child? How many people do you know? And how those lives were scraped out. * * * That was her business. Abortions were her business. * * * Well, ladies and gentlemen of the jury, those two pregnancies of Mary Karageorge and Esther Carlin, those were God's children; they were waiting to be born and take their place in this world."

Defendant also complains of other remarks, to which no objection was made at the trial, in which the prosecutor told the jury "It wasn't easy for us to have to ask you to listen to that type of filth and rot that you did here. But because of certain members of our community who prey on that filth and rot, it was necessary. I say, in closing, that this is your community. If you want to keep the back alleys of filth and rot, go ahead. Come here and pass on it and say it is all right. * * * If in order for us to be sincere and vigorous in a prosecution we have to wait until somebody is slugged or murdered, then we might as well wipe all the rest of the laws from our books."

It is impossible to lay down a precise rule in regard to what may or may not be said in an argument to the jury. After examining the remarks complained of in their context, and in the light of the nature and circumstances of this case, we do not consider them to be sufficiently improper and prejudicial to justify a reversal. It is improper, of course, to make statements the only effect of which is to inflame the passion or arouse the prejudices of the jury, without throwing any light upon the issues. (*People* v. *Galloway*, 7 Ill. 2d 527.) But a prosecuting attorney has the right to draw all the legitimate inferences he can from the facts proved, and the accused cannot complain that such deductions place him in a bad light before the jury. Thus the prosecutor may comment upon the conduct of the accused, and denounce his wickedness, if such comment and denunciation are based upon evidence competent and

pertinent to the issues. (*People* v. *Heywood*, 321 Ill. 380.) He also has the right to dwell upon the evil results of crime and to urge a fearless administration of the criminal law. (*People* v. *Beil*, 322 Ill. 434; *People* v. *Wood*, 318 Ill. 388.) While the present argument to the jury could have been made with more restraint the remarks in question have a basis in the evidence and were within the scope of permissible comment.

The evidence in the case at bar clearly sustains the jury's verdict, and no prejudicial error has been shown in the trial. The judgment will therefore be affirmed.

*Judgment affirmed.*